

In the Matter of Merchant Mariner's Document No. Z-580439  
Issued to: WILLIAM H. BROADBENT

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

379B

WILLIAM H. BROADBENT

This appeal has been taken in conformance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 17 August, 1946, Appellant was charged with "misconduct" before a Coast Guard Hearing Officer at Naples, Italy. The charge was based upon two specifications alleging in substance that while serving as fireman-watertender on board the American S. S. ELMIRA VICTORY, under authority of Merchant Mariner's Document No. Z-580439, on or about 16 August, 1946, Appellant killed an Italian civilian, Vincenzo Cottino, and he had in his possession a dangerous weapon. It was alleged that both of these offenses took place while the ELMIRA VICTORY was in a foreign port. Appellant was represented by a shipmate who acted as his counsel. A plea of "not guilty" was entered to the charge and each specification. After the testimony of two witnesses had been received in evidence, the hearing was adjourned on motion of Appellant's counsel so that Appellant might obtain more competent counsel because of the seriousness of the charge.

On 31 May, 1949, the hearing was reconvened before a Coast Guard Examiner at New York City and Appellant was given a full explanation of the nature of the proceedings and the possible consequences. The hearing was again adjourned, on this date, to afford Appellant an opportunity to secure adequate legal assistance.

On 2 June, 1949, the hearing was reconvened and Appellant was represented by his present counsel. The Investigating Officer made a motion to dismiss the charge and specifications without prejudice on the ground that neither specification set forth a cause of action. This motion was opposed by Appellant's counsel. After argument by both parties, the Examiner found that neither specification set forth a cause of action upon which a charge of misconduct could be based and he concluded that the specifications were "dismissed without prejudice." But he then issued an order, dated 7 June, 1949, stating that the specifications and charge were simply "dismissed." On appeal, I remanded the case for further proceedings, by my order of 29 September, 1949, because the Examiner's conclusions and order were inconsistent and, therefore, void and invalid.

On 27 October, 1949, pursuant to my order of 29 September, 1949, Appellant appeared before an Examiner of the United States Coast Guard at New York City to answer the same charge

and specifications. Appellant made a motion to dismiss on the ground that the inference from my decision is that the conclusions and order of the Examiner should be made consistent with each other by "dismissing" the charge and specifications rather than "dismissing without prejudice." The motion was based on the further ground that my decision meant that this proceeding should be terminated and that a second hearing based on a second set of charges for the same offenses should be pursued. The Examiner denied the motion, stating that my decision clearly indicates that the action anticipated was for the Examiner to amend the specifications pursuant to Title 46 Code of Federal Regulations 137.09-5(c). On motion by the Investigating Officer, both of the specifications were amended by inserting the word "wrongfully". Appellant argued that this was a change in the substance of the specifications and 46 C.F.R. 137.09-5(c) only permitted amendments to correct clerical errors or errors of form. The Examiner ruled that this was an amendment of form and the specifications remained the same in substance. Over objection by the Investigating Officer, the amended specifications were read to Appellant in order that he might plead to them. Again, Appellant entered a plea of "not guilty" to the charge and both specifications.

Appellant then contested the jurisdiction of the Coast Guard on the grounds of double jeopardy and that Appellant was not in the service of the ship since the offense was committed while he was on shore leave. The Examiner upheld the jurisdiction on both points.

Thereupon, the Investigating Officer introduced in evidence the testimony of one of Appellant's fellow shipmates on the ELMIRA VICTORY and two consular reports of the American Consulate General of Naples, Italy. The consular reports were objected to by Appellant on the ground that their contents were largely hearsay evidence and, therefore, inadmissible.

Appellant then made a motion to strike the entire testimony taken at Naples since the hearing held at that place was based on the original specifications which set forth substantially different charges than the amended specifications. The Examiner denied the motion because the amendments were made according to orderly legal procedure and Appellant was not surprised nor was he in any way prejudiced by the amendments.

Because Appellant was represented by inadequate counsel during the Naples phase of the hearing, Appellant's present counsel was permitted to object to some of the testimony of the two witnesses who appeared at Naples. As a result of this, parts of the answers of these two witnesses were stricken from the record by the Examiner (R. 3, 4, 5). Appellant then rested his case.

A further motion by Appellant, that the charge of "misconduct" be dismissed on the ground that the Investigating Officer had failed to establish a prima facie case by competent, probative, reliable and substantial evidence, was denied by the Examiner.

At the conclusion of the hearing, having heard the arguments by the Investigating Officer and Appellant and having afforded both parties an opportunity to submit proposed findings and conclusions, the Examiner found the charge "proved" by proof of both specifications and he entered an order dated 30 November, 1949, revoking Merchant Mariner's Document No. Z-580439 and all other valid documents issued to Appellant by the U. S. Coast Guard and predecessor authority.

On 3 November, 1949, the Coast Guard Examiner, before whom Appellant appeared to answer a second set of charges based on the same offenses, discontinued the second hearing and declared that it had been rendered null and void by the prior, valid proceeding. A stay of the proceedings in this second hearing had previously been granted on 6 October, 1949, pending the determination of the first appeal of the hearing under consideration herein.

This appeal has been taken from the Order of the Examiner dated 30 November, 1949, and it is urged that:

- Point 1: The Coast Guard was without jurisdiction to revoke the documents of the person charged for alleged misconduct not committed while in the service of the ship;
- Point 2: The person charged did not receive a fair hearing in accordance with the Coast Guard Regulations and applicable law;
- Point 3: The Investigating Officer did not establish a prima facie case by competent, reliable and probative evidence and the motion to dismiss, on his failure to do so, should have been granted; and
- Point 4: All of the facts and circumstances in the case do not warrant the penalty of revocation.

Appearances: Herman E. Cooper of New York City

By Samuel Leigh of Counsel

Based upon my examination of the Record submitted, I hereby make the following

#### FINDINGS OF FACT

On 16 August, 1946, Appellant was in the service of the American S. S. ELMIRA VICTORY, as fireman-watertender, acting under the authority of his Merchant Mariner's Document No. Z-580439, while the ship was at Naples, Italy.

On the evening of 16 August, 1946, prior to Appellant's departure from the ELMIRA VICTORY, there was a small pistol (in the open drawer of a desk in Appellant's room on the ship) which belonged to Appellant. This pistol was seen in this location by at least one of the five seamen with whom Appellant later went ashore. Possession of such a dangerous weapon by a seaman was prohibited by the articles which Appellant had signed and under which he was serving.

At approximately 2000 on this same date, Appellant and five other seamen left the ship together to go on shore leave. Appellant had a carton of cigarettes in his left hand. When the seamen were in the vicinity of the gate leading to the pier where their ship was berthed, an Italian boy named Vincenzo Cottino tried to take the carton of cigarettes from Appellant's hand. Appellant raised his right arm and fired a single shot at Cottino who was then about two feet away from Appellant. Cottino was killed almost instantly and all six of the seamen were immediately

apprehended by the police. A search of their persons did not reveal a gun on any of them.

Appellant was imprisoned until the time of his trial on 30 December, 1947. He was then tried before the First Session of the Court of Assizes in Naples, Italy, and was found guilty of homicide while exercising in excess his right of self-defense. Due to the extenuating circumstances, the sentence imposed was one year, one month and ten days imprisonment. Appellant was represented by counsel at this trial before the Italian court.

There is no record of any prior disciplinary action having been taken against Appellant by the United States Coast Guard or its predecessor authority.

### OPINION

It is contended on appeal that the Coast Guard had no jurisdiction in this case; that Appellant was not afforded a fair hearing; that a prima facie case of Appellant's guilt was not established; and that revocation is not justified by the facts and circumstances.

Appellant has cited Aguilar v. Standard Oil Company (1943), 318 U.S. 724 and four other cases in support of the proposition that the Coast Guard was without jurisdiction to take action against Appellant's document in this case because Appellant was not "in the services of the ship" at the time he shot and killed Cottino. In my previous decisions, the Aguilar case has been cited as authority for the statement that a seaman on shore leave is "in the service of the ship" and, consequently, "acting under the authority of his document."

Although the Supreme Court expressly limited its decision in the Aguilar case and its companion case, Waterman Steamship Corp. v. Jones (1943), 318 U.S. 724, to seamen injured on premises in the immediate vicinity of the ship while going from or returning to it, no logical basis was suggested for distinguishing between an injury occurring in the vicinity of the vessel and one occurring elsewhere; and later cases have extended this doctrine by upholding the right of recovery for injuries sustained on shore leave without regard to whether they were sustained in the vicinity of the ship while leaving or returning to it. Dasher v. United States, 59 F. Supp. 742; Kyriakos v. Goulandris, 151 F. 2d 132; Nowery v. Smith, 69 F. Supp. 755, affirmed 161 F. 2d 732; Smith v. United States, 167 F. 2d 550.

All four of these latter cases followed the decision of the Supreme Court in the Aguilar case, while the four cases cited by Appellant were all decided prior to the Supreme Court's reversal of the lower court's decision (Aguilar v. Standard Oil Co. of New Jersey (1942), 130 F. 2d 154, cert. den. 317 U.S. 681, rev. 318 U.S. 724) in the Aguilar case. As a matter of fact, the four cases cited by Appellant were all mentioned in the lower court's decision of the Aguilar case. Consequently, their value as authority for the point in question was entirely erased by the Supreme Court's decision. In Smith v. United States (1948), 167 F. 2d 550, it was specifically stated that the Supreme Court's Aguilar decision repudiated the holdings in two of the cases cited by Appellant. (Smith v. American South African Lines, 37 F. Supp. 262; Collins v. Dollar Steamship Lines, 23 F. Supp. 395) In this same case, it was held that in an action for maintenance and cure only some wilful misbehavior or deliberate act of indiscretion suffices to deprive a seaman of his protection and he is still "in the service of the ship" even though pursuing his own personal interests while on shore leave. Hence, there is no doubt that Appellant was "in the service of the ship" and subject to Coast Guard jurisdiction because he was "acting under authority of his document" at the time of the shooting.

Appellant also contends that since the Federal courts of the United States would have no jurisdiction to prosecute Appellant for his unlawful acts committed ashore in Italy, the Coast Guard is also without jurisdiction. This argument ignores the fact that this is a proceeding under a remedial rather than a penal statute and Appellant's own statements that this action is appropriate, from the jurisdictional point of view, if Appellant was "in the service of the ship" at the time of the offense. The latter proposition has been thoroughly discussed above. The Supreme Court clearly stated in the Aguilar decision that the rights, privileges, duties and liabilities of seamen, on or off the ship, are not the same as those pertaining to men who are ordinarily employed on land at all time. Since they are entitled to the benefits of maintenance and cure while on shore leave, it is only fair that they assume analogous obligations while in such a status.

Although the Coast Guard may assume jurisdiction in all such cases, it will exercise its discretion to do so only when the offense committed ashore is such as to be an actual or potential threat to the safety or discipline aboard American merchant vessels.

It is further claimed that Appellant was not given a fair hearing because he was put in double jeopardy; the amendments of the specifications were ones of substance and therefore violated Title 46 C.F.R. 137.09-5(c); the testimony received at Naples should not have been considered as part of the remanded hearing; and the improper admission of Appellant's criminal record was so prejudicial that it brought about the order of revocation by the Examiner.

The doctrine of double jeopardy was discussed at some length in my prior decision remanding this case for further hearing. As stated therein, there may be a penal action as well as a remedial one, resulting from the same offense, without any infringement of the "double jeopardy" doctrine. And there can be no question of the propriety of the remedial proceedings, which are addressed to safety of life, property and discipline, instituted by the Coast Guard as long as a valid hearing is held based on the same offense. As will be more fully discussed, the proceedings held, after the case was remanded, were a continuation of the hearing commenced at Naples and later at New York. A second hearing which was begun at New York under a new set of charges was declared to be null and void, by the Examiner conducting it, when this case was remanded for further proceedings.

Contrary to Appellant's impression, it is my opinion that the amendments to the specifications were of form and not substance. Consequently, they were permissible pursuant to Title 46 C.F.R. 137.09-5(c). This is especially true with respect to the specification alleging that Appellant killed Cottino. Unless the taking of a human life can be justified the offense is considered per se to be "misconduct" within the purview of Title 46 U.S.C. 239. This was implied in my prior opinion which stated "If any correction was deemed necessary \*\*\*\*\*". In addition, the element of "wrongfulness" is inherent in the charge of "misconduct" which was proffered against Appellant. Since there was no material change in substance in either specification, by the addition of the word "wrongfully", I see no reason why the testimony taken during the proceedings at Naples should not be considered in determining the case. Appellant was in no way prejudiced by the later amendment of the specifications and there was no objection raised to the sufficiency of the specifications during the Naples phase of the hearing.

Appellant's criminal record was properly received when introduced to rebut the evidence of Appellant's good character. I fail to see any relationship between this usual judicial procedure and the mandatory provisions of Title 46 C.F.R. 137.09-70.

The latter provision does not in any way limit or exclude the introduction of evidence to attack a person's character when Appellant has first introduced evidence to show that his character is good.

Appellant also contends that the Investigating Officer did not establish a prima facie case by competent, reliable and probative evidence as required by 46 C.F.R. 137.21-5. As pointed out by Appellant, the testimony of Ascione, which was taken at Naples, appears on the surface to be slightly contradictory. But since the gist of his testimony is corroborated by Connelly's later testimony taken at New York more than three years later, the apparent inconsistencies in Ascione's testimony can readily be attributed to his poor command of the English language and the consequent necessity to obtain the services of an interpreter to record his answers. Although neither witness testified that he actually saw a pistol in Appellant's hand at the time of the shooting, they both gave testimony to the effect that Appellant definitely was the person who did the killing. Hence, Appellant urges that their testimony is circumstantial and is not substantial, reliable and probative for this reason. But the competency of circumstantial evidence is not open to question provided it is the best evidence obtainable; and both witnesses were very close to Appellant at the time of the shooting. The fact that neither of them saw the pistol in Appellant's hand is understandable since it was night-time when the incident occurred. Circumstantial evidence may be as satisfactory as positive testimony and will sometimes outweigh it. Since the testimony of these two men was not contradicted by any other evidence, it is my opinion that it supplied the necessary substantial, reliable and probative evidence required to establish a prima facie case against Appellant.

Appellant also objects to the admission in evidence of the consular reports and the Examiner's consideration of the hearsay portions of one of these reports in arriving at his fourth finding of fact. Since the consular reports are admissible under a statutory provision, the question presented pertains to the weight and sufficiency given to that part of the consular report which reported that Appellant was found guilty of homicide by the Italian court. This evidence in itself might not be sufficient on which to uphold the proof of the specification alleging that Appellant killed Cottino; but considering this in conjunction with the testimony supporting the finding that Appellant shot and killed Cottino, it is my opinion that this hearsay evidence is of a substantial nature and did not prejudice Appellant's rights. The Examiner's decision should not be reversed as a result of the admission and consideration of the consular report. In the case of Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229, the court stated:

"The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statute provides that the rules of evidence prevailing in courts of law and equity shall not be controlling. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order."

Appellant states that the specification pertaining to the possession of a gun was not clear as to whether he would have to defend on the question of possession of the gun while on board ship or while ashore. As a consequence, Appellant contends that he was denied his constitutional right to be adequately informed of the offense charged so that he might have a fair opportunity to prepare his defense. Due process requires that the specification must be sufficiently informative to advise a person of the charge he has to meet so that he can identify the offense charged and prepare whatever defense he may have. But it is not required that evidentiary facts be set forth in the specification. Appellant had ample opportunity to request a clarification of the specification during the course of the hearing. He neither did that nor did he attempt to refute possession aboard or ashore. Considering all the evidence together, it is a reasonable inference that Appellant had a gun in his possession on board the ship and also while he was ashore. As stated by the Examiner, he necessarily had one in his possession when he shot Cottino; and since this incident occurred while Appellant was walking away from the ship, he must have had the gun when he left the vessel. In addition, a pistol was seen in a desk in Appellant's room shortly before he went on shore leave. There is substantial evidence present if a reasonable man is justified in drawing the inference of fact that is sought to be sustained even though the evidence permits two or more possible inferences. Baltimore and Ohio Railroad Co. v. Postom (C.C.A., D.C., 1949), 177 F. 2d. 53. Hence, there is no merit in Appellant's argument that the gun in the desk might have belonged to someone else who occupied the room with Appellant.

### CONCLUSION

Considering all the facts and circumstances in this case, it is my belief that the order of the Examiner was entirely justified. As pointed out by the Examiner, Appellant was found guilty of having committed a very serious offense and one which makes his presence on American merchant vessels undesirable. And it is not clear from the record in what way his ability to present an adequate defense was weakened, since there is no indication that he at any point sought to obtain the testimony of witnesses by subpoena or other means at his disposal.



ORDER

The Order of the Examiner dated 30 November, 1949, should be, and it is, AFFIRMED.

MERLIN O'NEILL  
Rear Admiral, United States Coast Guard  
Acting Commandant

Dated at Washington, D. C., this 30th day of June, 1950.